88-1585

No. _____

Supreme Court, U.S.
MAR 28 1989

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

NORMAN B. SMITH and ROBERT A. BAILEY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

John Gigounas, Esq.
(Counsel of Record)
Richard Rideout, Esq.
c/o SIMPSON & GIGOUNAS
50 California St., Suite 2450
San Francisco, CA 94111
(415) 391-4900
Attorneys for Petitioners

March 24, 1989

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QUESTIONS PRESENTED

1. Whether the evidence was insufficient to sustain the convictions of defendants.

2. Whether the verdict form was improper denying defendants due process.

PARTIES TO PROCEEDINGS BELOW

All parties appear in the caption of the case set forth above.

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The defendants-appellants respectfully pray that a writ of certiorari issue to review the affirmance of the conviction of the defendants by the Court of Appeals for the Tenth Circuit, which petition for rehearing before such court was denied on February 1, 1989.

OPINIONS BELOW

The conviction of defendants under 18 U.S.C. section 371 and under 18 U.S.C. section 2 and 1014 for conspiracy and for making false statements to a federally insured institution for purposes of obtaining loan funds was affirmed by the Tenth Circuit in an opinion filed February 1, 1988, with a petition for rehearing denied February 1, 1989. The opinion of the Tenth Circuit is printed in Appendix Exhibit A hereto. The denial of the rehearing is printed in Exhibit B.

JURISDICTION

The Supreme Court of the United States has jurisdiction to review the determination of the Tenth Circuit Court of Appeals pursuant to Article III of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The federal penal statutes involved are: 18 U.S.C. sections 2, 371 and 1014. The provision of the United States Constitution involved is the due process clause of the Fifth Amendment.

STATEMENT OF THE CASE

The relevant facts of this case are set forth as follows:

A. Course of proceedings in the case now before this court.

This case arose upon a grand jury eight count indictment charging defendants with making false statements to a federally insured institution for purposes of obtaining loan funds and for aiding and abetting, and upon one count for conspiracy with respect to such: Defendants were convicted on the conspiracy count and five of the eight false statement and aiding and abetting

counts. The case was appealed to the Tenth Circuit and an opinion (published) was filed January 29, 1988. A petition for rehearing was timely filed and was denied February 1, 1989. This petition is filed within 60 days of the denial.

B. Relevant facts concerning questions presented.

1. Indictment provisions.

On November 21, 1985, a grand jury indictment charging nine counts was filed against Norman B. Smith and Robert Bailey in the United States District Court for the District of Wyoming. (indictment - Appendix Exhibit C)

Counts two through nine charged that defendants knowingly made materially false statements on invoices submitted to the Stockmans Bank located in Gillette, Wyoming, for expenses on the Knollwood condominium project when defendant knew certain amounts specified were intended

for their personal use unrelated to said project, and that the said defendants did knowingly and intentionally aid and abet each other in the commission of said offense in violation of 18 U.S.C. sections 2 and 1014. Count one was a conspiracy count under 18 U.S.C. section 371 based upon allegations in counts two through nine. Count one through nine claimed the amounts involved were for personal use of Smith and Bailey.

(2) Development project, loan proposal language and invoices submitted.

The indictment arose out of a transaction whereby Smith and Bailey were developers through respective corporate entities of a condominium project known as Knollwood located in Gillette, Wyoming. Rocky Mountain Properties (RPM) was a Wyoming corporation owned by Smith. RPM was the corporation through which Smith operated a real estate

development and management business. (TR 11-60, 201-202 - Vol. 2 - Oct. 21) Alpha Development Corporation was formed by Smith/Bailey to develop Knollwood. (TR 11-60, 200-201 - Vol. 2 - Oct. 21) Interwest Corporation was formed by Smith/Bailey to promote and sell pre-fabricated homes. (TR 11-60 - Vol. 2 - Oct. 21)

The project financing was designed pursuant to a plan whereby a certain number of condos would be presold and the profit would be used to develop the next successive phase. (Ex. 1; TR 161-203 - Vol. 2 - Oct. 21)

Project costs were projected in a loan proposal brochure. The brochure was 19 pages. One sentence in the brochure stated:

> "The Construction Financing requested by Alpha IV on this project is only for: A/E, Design, Minimum Site-Work, Foundations, Landscaping, and Site Completion."

A schedule of cash flow projections was attached and is partially reprinted as Appendix Exhibit D.

In order to develop the first phase, Smith and Bailey arranged a $300,000 loan with Stockmans Bank. The loan was arranged in or about 1981 with the bank president, Kenneth Narmore. Immediately upon granting the loan, (Ex. 1; TR 161-204 - Vol. 2 - Oct. 21, TR 3-8 - Vol. 3 - Oct. 22) Monarch submitted invoices to Alpha, which Alpha through Bailey submitted to the bank for payment. RPM submitted invoices to Alpha, which Alpha through Smith submitted to the bank of payment. * Interwest submitted invoices to Alpha, which Alpha submitted to the bank for payment. Also, some

construction/engineering costs were invoiced directly to Alpha, which Alpha submitted to the bank for payment. Smith and Bailey submitted individual invoices to Alpha. (Monarch, Exs. 111, 117, 121, 131, 135; RPM, Exs. 107, 115, 119, 125, 129, 133; Interwest, Exs. 105, 123; Smith/Bailey, Exs. 109, 113; Scott, D; Morris, C)

Monarch, RPM and Interwest maintained business accounts intc which payments on invoices to Alpha were deposited and checks were written.

As part of the overall $300,000 loan and with respect to certain invoices, the United States excluded approximately $95,000 which went for engineering and foundation construction. Approximately $206,000 was alleged by the government to be for unauthorized personal use.

Monarch maintained offices in Denver and incurred and paid ordinary expenses such as rent, secretarial, postage, supplies, travel, etc. Bailey drew amounts from Monarch as compensation and reimbursement for expenses. Monarch's billings to Alpha for services were for Knollwood and were based upon an hourly fee. The same was true for RPM. Interwest was paid with respect to deposits and services on homes to be built. (Exs. listed above under par. 14, TR 161-204, Vol. 2 - Oct. 21; 3-74, Vol. 3 - Oct. 22)

The government's principal evidence consisted of the invoices and testimony of Naramore and the investigating FBI agent, Mortensen. Neither these witnesses, nor other witnesses, nor other evidence, dealt with the indictment charge that the invoiced expenses were "personal" and "unrelated" to Knollwood.

The FBI agent testified that he recognized that both Monarch and RMP were real estate development businesses and that such businesses had business expenses for rent, secretarial, phone compensation (draws) by principals, etc. and, notwithstanding, such were treated by the government as "personal" "unrelated" to Knollwood. The agent testified that he only allowed as non-personal and unrelated items, payments to Boise homes, Morris Construction and Scott Engineering. He did not contact payees to determine relationships. Naramore on cross-examination testified that: "I wouldn't say they (Smith and Bailey) made false statements, I would say that they made statements which were beneficial to them." (TR 11-60, Vol. 2 - Oct. 21; TR 117, Vol. 1 - Oct 20)

Robert Bailey testified that all

expenses charged to the bank loan whether by him, Monarch, RPM or Smith, were directly related to the Knollwood project either as direct costs, expenses or service fees. (TR 161-204, Vol. 2 - Oct. 21; TR 3-90, Vol. 3 - Oct. 22).

3. Verdict form and conviction

Defendants were each convicted of counts one, two, five, six, seven and nine of the indictment.

The verdict form combined in one sentence the false statement and the aiding and abetting charge. (Verdict - Appendix Ex. E).

ARGUMENT I

THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE CONVICTION

This court, at page 6 of the opinion, recites the elements of 18 U.S.C. section 1014 as, (1) that defendant made a false statement to a

bank; (2) that such was done to influence bank action; (3) that the statement was false as to a material fact and (4) that the defendant knowingly made false statements. The court went on to state that the wording in the indictment that defendants made false statements per the invoices submitted on the Knollwood project, knowing such were intended for "personal use unrelated", to the project was surplusage and the prosecution did not have to prove such.

Petitioners submit that the court misconstrued the relationship of the proof as to personal use and the falsity of the statements.

The government's position per the indictment, and as argued at trial, was that the invoices were false because many of the items involved, and the amounts paid therefore, were for personal use unrelated to Knollwood.

The government seized on one paragraph in the loan proposal to establish defendant's representation as to the purpose for the loan. That paragraph appears on page 10 and is stated as:

> "The construction financing requested by Alpha IV on this project is only for: A/E, design, minimum site-work, foundations, landscaping, and site completion." (page 24 of appellant's addendum to opening brief)

The government thus went on to claim that any costs or expenses that did not go directly into the project in terms of material or labor i.e., hard costs, were not within the terms of the loan proposal and payments for services per invoices of Bailey and Smith and their related entities in overseeing and developing the project i.e., soft costs, were intentionally false.

This court in affirming the convictions, states that defendant's

original promise i.e., the loan proposal paragraph above quoted, was ongoing and was implicitly contained in the invoices submitted. The court then went on to say that section 1014 prohibits the making of any false statement for purposes of influencing action of the bank in any way.

First, the court fails to take into account the fact that the paragraph in question is ambiguous. Certainly hard and soft costs could be considered to fall within the ambit of each of the items listed, and, in particular, the "A/E" item (meaning architectural and engineering) is a general category that reasonably would include development expenses. Second, in looking at representations with respect to the use of loan proceeds, it is only reasonable and fair, and consistent with the most fundamental rule of document construction, that the entire document be

considered and that specific provisions control over more general, ambiguous provisions. The project feasibility projection schedules, which were part of the loan request (page 33 of the brief addendum) show dollar designated categories for A/E expense ($40,000 1st phase) and "expenses" generally ($169,779). $10,000 is also projected as "other" expense. On the same schedule under "cash received" the $300,000 in loan proceeds is identified and from the proceeds in the first two months alone $141,186 was set forth in a general expense category. The third month projection shows sales income of $822,000. Obviously, this income was not later realized because of the numerous problems that developed with the project buildout.

Each of the invoices submitted specified a category of expense and most

were in general terms, for example "contract services", or "services rendered."

The court concluded that a reasonable jury could have found that the invoice submissions evidence an intent to influence the bank to disburse money in a manner contrary to the original agreement.

The government never charged that the so-called original promise was false of that the description on the invoices were themselves false in terms of the type of expense listed. The claim is solely that the invoiced descriptions were beyond the scope of the original promise. With ambiguous language in the loan proposal paragraph above quoted, and with other provisions of the loan document providing for categories of expense within the ambit of the invoice descriptions, and with no proof that the invoiced expenses were "personal -

unrelated to Knollwood", a reasonable jury should not have found defendants guilty. (It is also worthy of note that out of the same transactions, the jury convicted on some counts and not others which, taken in connection with the proof problems outlined above, shows that the jury did not act reasonably).

The court holds that the variance between the indictment and proof may be disregarded if it does not affect an essential element of the offense so as to impair substantial rights of the defendant.

The indictment language interjecting the personal use - unrelated to Knollwood - language, which the government did not prove, clearly could have misled the jury as to the false statement and the influence elements of section 1014 in directing the jury to believe that such were in fact critical

elements of the crime charged. This misleading aspect thus impaired substantial due process rights of defendants in securing a fair trial.

Also fundamental to the question of whether false statements were made that influenced the bank, is the government's complaining witness, Ken Naramore, the bank president. He categorically stated that he would not say defendants made false statements. If the bank president did not consider the statements on the invoices false in terms of influencing the bank, how then was the bank falsely influenced. United States v. Fairbanks, 541 F.2d 862 (10th Cir.) is inapposite in light of Naramore's testimony.

Thus, in summary, finding that the so-called original promise, ambiguous at most, and qualified by the specific items in the schedules in the proposal, is linked to invoices, on their face

correctly representing expense categories, to create a false statement situation is not reasonable and a reasonable jury would not have so found.

ARGUMENT II

REVERSIBLE ERROR WAS COMMITTED IN THE VERDICT FORM AS THE DEFENDANTS WERE DENIED THEIR DUE PROCESS RIGHT UNDER THE FIFTH AMENDMENT TO A CLEAR UNAMBIGUOUS AND CERTAIN DECISION

The defendants contend that the trial court committed reversible error in allowing the verdict format, submitted over objection of the defendants, to be considered and used by the jury, in that the verdict form itself required the jury to find each defendant (Bailey and Smith) guilty or not guilty "of making false statements and aiding and abetting" as set forth in counts two through nine of the indictment (emphasis added). The defendants contend the language and structure of the verdict form was

prejudicial and erroneous as the verdict form did not allow the jury to differentiate between two separate and distinct offenses. As a result, the verdict operated to deny the defendants of their due process rights, protected by the Fifth Amendment to the Constitution of the United States of America, to have the verdict of the jury convicting them of various felonies, made clear, unambiguous and certain.

The defendants contend that the act of making false statements (§1014) and the act of aiding and abetting the making of false statements (2) are or could be inconsistent as a matter of law as it is possible to do one act without doing the other, and it is impossible for one defendant to do both in the same transaction. Yet, the verdict form in this case as submitted has just that infirmity. For example, in count five

(for which both defendants were convicted), Smith and Bailey were both charged with "knowingly making materially false statements" on an invoice submitted to the bank on February 9, 1982, for the purpose of influencing the bank to part with a sum of money. Count five continues and then charges each defendant with "knowingly and intentionally" aiding and abetting each other in the commission of said offense.

It is apparent that Smith could not make a false statement and aid and abet himself in the making of that statement. The same is true for Bailey. In addition, they both could have made a false statement, but they could not have both aided and abetted the making of a false statement, for by making the statements, they would both have been the "principal" in the offense. In any

event, the act of aiding and abetting is separate and distinct from the act of making a false statement; separate acts that should have been so delineated on the verdict form, as to each as a separate offense.

The test for the validity of a verdict is whether it is certain, unqualified and unambiguous. United States v. Morris, 612 F.2d 483, appeal after remand, United States v. Jelsma, 630 F.2d 778 (10th Cir. 1979). Tapley v. United States, 353 F.2d 786 (5th Cir. 1965). In determining the sufficiency or adequacy of a verdict, the controlling object is to learn the intent of the jury, and therefore, the verdict must be sufficiently definite and certain so, for example, that upon entry of a judgment thereon, it would constitute a bar to ruther prosecution, under the double jeopardy clause, for the same offense.

State v. Sue, 594 S.W. 2d 351 (Mo. App. 1980).

The defendants here have been prejudiced in numerous ways. Due process requires a clear, unambiguous, certain verdict form. In this case, the defendants were not allowed the opportunity to be acquitted of either the charge of making the false statement or of aiding or abetting the offense. An acquittal on either would also operate to bar subsequent prosecutions, for example, on a reversal of any of these convictions, under the "double jeopardy" clause of the Fifth Amendment.

The verdict form, by failing to separate the two charges, deprived the defendants and the jury, the right to compromise these verdicts, by, for example, convicting one defendant of making the false statement and the other of aiding and abetting. Combining the

charges could also have the stigmatizing effect of two felony convictions (making the false statement and aiding and abetting) instead of one, a cumulative effect that could result in a more rigorous sentence or longer probation or parole.

The net effect was to deny the defendants' their due process right to a certain, unambiguous and unqualified verdict, separate as to each charge and each defendant, so the result of the trial would be unquestioned.

Defendants take strong exception to the Tenth Circuit reliance on United States v. Cook, 745 F.2d 1311 (10th Cir. 1984).

It submitted that the court confuses the question of elements of proof with respect to aiding and abetting with the question of prejudice. The verdict form could have confused and

misled the jury substantially in addressing the question of guilt of each defendant. There was no instruction given to clarify the verdict form even though defendant objected. At a minimum, without an instruction, the jury form was highly prejudicial. It was contrary to the simple proposition that guilt or innocence is to be established in a clear, unambiguous and certain fashion. Cook, supra, itself demonstrates the fine line drawn by lawyers and judges. It is not reasonable to assume lay jurors would understand the distinctions where aiding and abetting is charged and mixed up in the verdict form with the principal offense under section 1014.

CONCLUSION

The Supreme Court should grant the writ requested herein.

Dated: March 24, 1989

John Gigounas
(Counsel of Record)

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Filed January 29, 1988

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	Nos.
Plaintiff-Appellee,	)	87-1010
	)	87-1011
v.	)	
	)	
NORMAN B. SMITH and ROBERT A. BAILEY,	)	
	)	
Defendants-Appellants.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING
(D.C. Nos. CR 85-100-01K and CR 85-100-02K)

Edward B. Simpson, Simpson & Gigounas, San Francisco, California (John Gigounas of Simpson & Gigounas, was also on the brief) for Defendant-Appellant Bailey

Richard Rideout, Freudenthal, Salzburg, Bonds & Rideout, Cheyenne, Wyoming, for Defendant-Appellant Smith

David A. Kern, Assistant United States Attorney, Cheyenne, Wyoming, (Richard A. Stacy, United States Attorney, Cheyenne, Wyoming, was also on the brief) for Plaintiff-Appellee

Before HOLLOWAY, Chief Judge, ANDERSON, Circuit Judge, and ALLEY,* District Judge.

HOLLOWAY, Chief Judge

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*The Honorable Wayne E. Alley, United States District Judge for the Western District of Oklahoma, sitting by designation.

Defendants-appellants, Norman B. Smith and Robert A. Bailey, were convicted under 18 U.S.C. §371 and under 18 U.S.C. §§1014 and 2 for conspiracy and for making false statements to a federally insured institution for purposes of obtaining loan funds. Defendants appeal, arguing: 1) the evidence was insufficient to sustain the convictions; and 2) the verdict form was improper so as to deny them due process. We affirm.

I

Viewing the evidence favorably to the verdict, as we must, it tends to show the following:

This case centers around a construction loan by the Stockman's Bank and Trust Company of Gillette, Wyoming to defendants to finance a condominium project called Knollwood. The bank's deposits are insured by the Federal

Deposit Insurance Corporation. In December of 1981 defendants applied for a $300,000.00 construction loan for the Knollwood project. They submitted a brochure to the Stockman's bank which stated: "The Construction Financing requested by Alpha IV on this project is only for: A/E, Design, Minimum Site-Work, Foundations, Landscaping, and Site completion." Government Ex., 1 at 11. Defendants orally explained the money would be used for these purposes only.

The bank approved the loan, which was set up for disbursement as follows: defendants formed Alpha IV Development Corporation ("Alpha"), which then opened an account at the bank. Subcontractors would submit their bills to Alpha which would then submit them to the bank as invoices. The bank would then disburse portions of the construction loan to Alpha's account and Alpha would issue

checks, over defendants' signatures, to the subcontractors.

The loan formalities were completed and two construction firms began work. By June of 1982 work was nearly complete. However, payments to the construction firms stopped unexpectedly and the first payment due on the construction loan became delinquent. When contacted by the bank, defendants gave assurances that money would be forthcoming. On these assurances, the bank made several more disbursements. A total of $298,796.96 was advanced to defendants through Alpha, but none of the money was ever repaid. Foreclosure proceedings ultimately left the bank with a loss of approximately $225,000.

Subsequent federal investigation revealed that defendants had submitted sixteen invoices, on eight separate dates, through their own subcontracting

corporations: Inter-West, Inc., which they owned jointly; Rocky Mountain Properties, Inc., owned by Smith; and Monarch Construction, Inc., owned by Bailey. The bank, unaware of defendants' ownership interests in these firms, credited Alpha's account on the basis of the invoices. I.R. at 57-58.

Defendants then wrote checks to themselves or to their subcontracting corporations. They used this money for several purposes unrelated to Knollwood. For example, approximately $230,000 was used to defray "soft" costs such as overhead, travel expenses, office supplies, salaries and expenses of defendants and their businesses, defendant's personal expenses and debts, prior loan obligations, and legal and accounting expenses. II R. at 24-28; V R. at 77-79. A bank officer, Mr. Naramore, testified the bank would not

have approved the loan if he had known that portions or all of the $300,000 was going for personal expenses, debts, travel expenses and similar expenses. I R. 56, 73.

Mr. Naramore, formerly president and chairman of the board of the bank after 1983, testified for the government. He admitted he was somewhat negligent and remiss in his management as to approval of the advances on the invoices. I R. 73, 92-93. The invoices did "demarcate" various legal expenses and things of this nature. I R. 73. These were not within the purposes in the loan proposal, as discussed earlier. Naramore also said as to the statements on invoices about contract services, legal, accounting, office and that type of expense, that he wouldn't say defendants made false statements; instead "they made statements which was

beneficial to them." I R. 117. Mr. Naramore testified further that had he known that Interwest Inc. was owned by Smith and Bailey and that Rocky Mountain Properties was owned by Smith, he would not have made the advances. I R. 75. Naramore also admitted that Ex. 1 showed Smith as the CEO of Rocky Mountain Properties. I R. 137.

On November 21, 1985, a grand jury returned a nine count indictment against defendants. Eight counts were based on the eight separate submissions of invoices. Each count charged the particular submission constituted a violation of 18 U.S.C. §1014 (making false statements to a federally insured institution for purposes of influencing action on loans or extensions of them and 18 U.S.C. §2 (aiding and abetting). The remaining count charged defendants with conspiracy in violation of 18 U.S.C. §371

and identified the eight submissions as overt acts. Defendant Bailey testified that all expenses charged to the bank loan by him, by Monarch, RPM or Smith were directly related to the Knollwood project as direct costs, expenses or service fees. IV R. 161-201; V R. 3-90.

A jury convicted defendants on the conspiracy count and five of the false statement counts. Defendant Smith was sentenced to four years' imprisonment on the conspiracy conviction, to be served consecutively with another sentence he was already serving. Defendant Bailey was sentenced to three years' imprisonment on the conspiracy conviction. Both defendants received suspended sentences on the five substantive convictions and were placed of five years' probation to commence upon release from confinement.

II

Defendants contend the evidence was insufficient to support the charges for which they were convicted. The indictment's substantive counts allege that the eight submitted invoices were for amounts "intended for [defendants'] personal use unrelated to said project." (emphasis added). E.g. I R. Item 1, at p. 4. Defendants contend the United States failed to introduce any evidence the amounts were for personal use and were unrelated to the Knollwood project. We find this argument unpersuasive.

A criminal defendant can only be tried on an indictment as found by a grand jury, and especially upon all language found in the charging part of that instrument. United States v. Conlon, 661 F.2d 235, 238 (D.C. Cir. 1981), cert. denied, 454 U.S. 1149 (1982). An indictment must contain the

elements of the offense and sufficiently apprise the defendant of what he must be prepared to meet. United States v. Salazar, 720 F.2d 1482, 1487 (10th Cir. 1983), cert. denied, 469 U.S. 1110 (1985). We have held that proof is not required of everything alleged in the indictment, United States v. Harper, 579 F.2d 1235, 1239 (10th Cir.), cert. denied, 439 U.S. 968 (1978), stating that:

> [p]roving beyond a reasonable doubt that a specific person is the principal is not an element of the crime of aiding and abetting. It is not even essential that the identity of the principal be established. The prosecution only need prove that the offense has been committed. [citations]. The fact that Hayden's name was specifically included in the indictment as a person whom [defendant] aided and abetted does not change what the prosecution must show. Proof of everything in the indictment is not required. When the language of the indictment goes beyond alleging the elements of the offense, it is mere surplusage and such surplusage need not be proved. [citation].

Id. at 1239-40; see also, United States v. Hughes, 766 F.2d 875, 878-89 (5th Cir.

1985).

The essential elements of the offense charged under §1014 are: 1) that he did so for the purpose of influencing the bank's action; 3) that the statement was false as to a material fact; 4) that the defendant made the false statements knowingly. United States v. Bonnette, 663 F.2d 495, 497 (4th Cir. 1981), cert. denied, 455 U.S. 951 (1982). These are the elements and the defendant's specific plans regarding what he will do with the funds once he obtains them is not an element of the offense. Here the intended personal use allegations were merely surplusage and the prosecution did not have to prove them. See Harper, 579 F.2d at 1239[1/].

1/ A variance between an indictment and the proof may be disregarded if it does not affect an essential element of the offense so as to impair substantial rights

The prosecution was required to prove that defendants misrepresented their intentions in the invoices submitted, as charged. Such false representations have been held sufficient to sustain bank fraud convictions. See, United States v. Shiveley, 715 F.2d 260, 264 (7th Cir. 1983), cert. denied, 465 U.S. 1007 (1984)(dictum). In this case, defendants misrepresented their intentions in the invoices submitted. Defendants' original promise was ongoing and was implicitly contained in the invoices submitted. 18 U.S.C. §1014 prohibits the making of any false statement "for the purpose of influencing

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1/ (cont'd) of the defendant. United States v. Nunez, 668 F.2d 1116, 1127 (10th Cir. 1981); United States v. Francisco, 575 F.2d 815, 818-19 (10th Cir. 1978); see also United States v. Hansen, 701 F.2d 1215, 1221 (7th cir. 1983).

in any way the action of . . . any bank the deposits of which are insured by the Federal Deposit Insurance Corporation . . ." (emphasis added). For purposes of 18 U.S.C. §1014, the bank's "action" could be the granting of a loan or the disbursement of loan funds. The question is whether the evidence, both direct and circumstantial, together with the reasonable inferences that can be drawn therefrom, when viewed in the light most favorable to the verdict, is such that a reasonable jury could find the defendants guilty beyond a reasonable doubt. United States v. Hooks, 780 F.2d 1526, 1529 (10th Cir.), cert. denied, 475 U.S. 1128 (1986).

The prosecution presented evidence that the defendants did not use the funds for the purposes stated in the brochure. F.B.I. special agent Mortgensen testified that he traced the flow of the funds

after the bank disbursed them. II R. at 17. Mortgensen's testimony was clear on Count II as to the use of funds obtained by invoices for $15,000 (Ex. 107), for $6,317 (Ex. 109) and for $6,200 (Ex. 113), not going to Knollwood creditors; it was not clear on the remaining invoices for $60,000 and $15,000 (Exs. 105 and 111) as to their use. On the $60,000 item, however, concerning an invoice for deposit to be applied to Boise Homes (Ex. 105), the Boise Company President testified that he did not recall receiving that amount of money on any kind of housing that the Company manufactures. II R. 7. We feel the Count II conviction is sufficiently supported by the record. See also II R. 21-28.[2/]

[2/] Mortgensen's testimony was based on his examination of the prosecution's exhibits consisting of the invoice

We likewise believe that Count V and the conviction thereon are supported by Mortgensen's testimony. II R. 32. Similar testimony supports the convictions on Count VI (II R. 34), Count VII (II R. 35-36), and in Count IX (II R. 39-40).

Count I, the conspiracy charge, and the conviction therefor are supported by circumstantial evidence such as, for example, the approvals of Smith and Bailey of invoices 113. and 133. I R. at 65,72. They concerned funds that did not go to creditors of the Knollwood project, according to Mortgensen. II R. 28, 39-40. From the circumstances we feel the jury could draw the findings necessary for the conspiracy conviction.

2/ (cont'd) submissions, disbursement records, deposit slips, checks, etc. These exhibits were transmitted to this court as part of a supplemental record under Fed. R. App. P. 10(e).

Due to the ongoing nature of these invoice submissions, we believe a reasonable jury could infer that these expenditures evidenced an intent to deceive the bank. See United States v. Fairbanks, 541 F.2d 862 (10th Cir.) (case involving deliberately inflated invoices submitted to federally insured bank), cert. denied, 429 U.S. 1002 (1976); United States v. Lipkis, 770 F.2d 1447, 1452 (9th Cir. 1985). Most important, a reasonable jury could have found that the invoice submissions evidenced an intent to influence the bank to disburse money, which would then be used in a manner contrary to the initial agreement. And the circumstantial evidence was sufficient for the jury to find defendants guilty of a conspiracy to commit the substantive offenses in violation of 18 U.S.C. §371. E.g. I.R. 65 (both defendants approved $6,200

invoice, according to Mr. Naramore, supporting Count II). 3/

3/ We recognize that defendants frequently submitted invoices that contained both true and false statements, some fairly revealing that legal or other expenses were included. On other occasions, defendants submitted both true and false invoices on the same date. Defendants might have made true and false statements simultaneously; however, the making of a false statement, together with other required proof, would support a conviction under §1014.

Our holding in United States v. Irwin, 654 F.2d 671 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982), does not affect this conclusion. In Irwin, various counts in the indictment alleged defendants committed substantive offenses, and anoter count alleged they conspired to commit offenses against the United States, these offenses being the same as those alleged in the substantive counts. We reversed some of the substantive convictions and then reversed the conspiracy conviction because we could not determine "whether the jury based its conspiracy verdict on a conspiracy to commit those very offenses [that we reversed]." Id. at 680. Here, we examine each conviction, viewing all the evidence together with all reasonable inferences therefrom in the light most favorable to the government. Id. at 673. We do not reverse the convictions

III

Defendants next argue that the verdict form was ambiguous and denied them due process. The verdict form, submitted over defendant's objection, required the jury to find defendants guilty or not guilty "of making false statements and aiding and abetting." (emphasis added). Defendants argue this wording did not allow the jury to differentiate between conviction as a principal and as an aider and abettor of the offense. Under the wording of the verdict form, each defendant was guilty as a principal and an aider and abettor, or not guilty.

3/ (cont'd) since there is evidence to support the convictions under the standard of proof of guilt beyond a reasonable doubt.

We agree with the government that United States v. Cook, 745 F.2d 1311 (10th Cir. 1984), cert. denied, 469 U.S. 1220 (1985), controls. In Cook, we noted that 18 U.S.C. §2 merely abolishes the common law distinction between principal and accessory and does not create an independent crime. Id. at 1315. To aid and abet one must share in the intent to commit the offense, as well as participate in some manner to assist its commission. United States v. Fischel, 686 F.2d 1082, 1087 (5th Cir. 1982). However, the defendant need not commit all elements of the underlying offense as long as he aided and abetted as to each element. Id.. A defendant can be convinced as an aider and abettor even though he was indicted as a principal for commission of the underlying offense and not as an aider and abettor, providing that commission of the underlying offense

is also proven. Cook, 745 F.2d at 1315, (citing United States v. Kegler, 724 F.2d 190 (D.C. Cir. 1983); United States v. Rodgers, 419 F.2d 1315, 1317 (10th Cir. 1969).

The effect of each count of the indictment was not to charge each defendant with two separate crimes. Instead, as in Count II it was charged that defendants made particular false statements to influence the bank to approve advances and that defendants aided and abetted each other in committing the offense. The effect of the guilty verdict on each count was not to have two separate convictions.

The convictions of the defendants are A F F I R M E D.

February 1, 1989

Before Honorable William J. Holloway, Jr., Honorable Stephen H. Anderson, and Honorable Wayne E. Alley, United States District Judge*

UNITED STATES OF AMERICA,	)	
	)	Nos.
Plaintiff-Appellee,	)	87-1010
	)	87-1011
v.	)	
	)	
NORMAN B. SMITH and ROBERT A. BAILEY,	)	
	)	
Defendants-Appellants.	)	

This matter comes on for consideration of appellants' petition for rehearing in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied.

ROBERT L. HOECKER, Clerk

*of the United States District Court for the Western District of Oklahoma, sitting by designation.

Filed November 21, 1985

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA,	)
	) No.
Plaintiff,	) CR85-0100
	) 18 U.S.C. §2
v.	) (aiding and
	) (abetting);
NORMAN B. SMITH and ROBERT A. BAILEY,	) 18 U.S.C.
	) §371
	) (conspiracy)
Defendants.	) 18 U.S.C.
	) §1014
	) (fraudulent
	) statements
	) to federally
	) insured bank

I N D I C T M E N T

The Grand Jury Charges that:

COUNT ONE

From on or about the 11th day of January, 1982, and continuously thereafter up to and including the 10th day of August, 1982, in the District of Wyoming and elsewhere, NORMAN B. SMITH and ROBERT A. BAILEY, the defendants herein, willfully and knowingly did combine, conspire, confederate and agree

together and with each other and with diverse other persons both known and unknown to the Grand Jury to commit the following offenses against the United States: to knowingly make materially false statements or reports to the Stockmen's Bank and Trust Company, a bank the deposits of which are insured by the Federal Deposit Insurance Corporation, for the purpose of influencing the action of said bank upon any advance or loan, in violation of 18 U.S.C. §1014. It was the purpose of the conspiracy to submit false invoices to the Stockmen's Bank and Trust Company in order to secure advances on a $300,000 construction loan made by the said bank for architectural and engineering expenses, design, minimum site work, foundations, landscaping and site completion on a condominium project known as "Knollwood". These advances in turn, would be utilized by NORMAN B.

SMITH and ROBERT A. BAILEY for personal use other than for the intended construction purposes.

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the defendants performed the following overt acts:

1. On or about January 11, 1982, NORMAN B. SMITH and ROBERT A. BAILEY secured a $300,000 construction loan from the Stockmen's Bank and Trust Company located in Gillette, Wyoming.

2. On or about January 11, 1982, NORMAN B. SMITH and ROBERT A. BAILEY submitted invoices to the Stockmen's Bank and Trust Company for payment of approximately $102,517 in listed expenses for the Knollwood condominium project.

3. On or about January 20, 1982, NORMAN B. SMITH and ROBERT A. BAILEY

submitted an invoice to the Stockmen's Bank and Trust Company for payment of approximately $16,101.96 in listed expenses for the Knollwood condominium project.

4. On or about January 22, 1982, NORMAN B. SMITH and ROBERT A. BAILEY submitted an invoice to the Stockmen's Bank and Trust Company for payment of approximately $15,946.21 in listed expenses for the Knollwood condominium project.

5. On or about February 9, 1982, NORMAN B. SMITH and ROBERT A. BAILEY submitted invoices to the Stockmen's Bank and Trust Company for payment of approximately $30,500 in listed expenses for the Knollwood condominium project.

6. On or about February 25, 1982, NORMAN B. SMITH and ROBERT A. BAILEY submitted an invoice to the Stockmen's Bank and Trust Company for payment of

approximately $10,000 in listed expenses for the Knollwood condominium project.

7. On or about March 2, 1982, NORMAN B. SMITH and ROBERT A. BAILEY submitted invoices to the Stockmen's Bank and Trust Company for payment of approximately $14,640.31 in listed expenses for the Knollwood condominium project.

8. On or about May 7, 1982, NORMAN B. SMITH and ROBERT A. BAILEY submitted invoices to the Stockmen's Bank and Trust Company for payment of approximately $12,355.99 in listed expenses for the Knollwood condominium project.

9. On or about August 10, 1982, NORMAN B. SMITH and ROBERT A. BAILEY submitted invoices to the Stockmen's Bank and Trust Company for payment of approximately $12,777 in listed expenses for the Knollwood condominium project.

All in violation of 18 U.S.C. §371.

COUNT TWO

On or about the 11th day of January, 1982, in the District of Wyoming, NORMAN B. SMITH and ROBERT A. BAILEY knowingly did make materially false statements on invoices submitted by the defendants to the Stockmen's Bank and Trust Company, a bank the deposits of which are insured by the F.D.I.C., for the purpose of influencing the action of said bank to approve advances on a $300,000 construction loan, in that NORMAN B. SMITH and ROBERT A. BAILEY stated and represented in said invoices that approximately $102,517 was owed for various expenses incurred on the Knollwood condominium project, when in truth and in fact, as NORMAN B. SMITH and ROBERT A. BAILEY well knew, approximately $100,001.09 was intended for their personal use unrelated to said project and the said NORMAN B. SMITH and ROBERT

A. BAILEY did knowingly and intentionally aid and abet each other in the commission of the offense.

In violation of 18 U.S.C. §§2 and 1014.

COUNT THREE

On or about the 20th day of January, 1982, in the District of Wyoming, NORMAN B. SMITH and ROBERT A. BAILEY knowingly did make materially false statements on an invoice submitted by the defendants to the Stockmen's Bank and Trust Company, a bank the deposits of which are insured by the F.D.I.C., for the purpose of influencing the action of said bank to approve advances on a $300,000 construction loan, in that NORMAN B. SMITH and ROBERT A. BAILEY stated and represented in said invoice that approximately $16,101.96 was owed for various expenses incurred on the

Knollwood condominium project, when in truth and in fact, as NORMAN B. SMITH and ROBERT A. BAILEY well knew, said sum of money was intended for their personal use unrelated to said project, and the said NORMAN B. SMITH and ROBERT A. BAILEY did knowingly and intentionally aid and abet each other in the commission of said offense;

In violation of 18 U.S.C. §§2 and 1014.

COUNT FOUR

On or about the 22nd day of January, 1982, in the District of Wyoming, NORMAN B. SMITH and ROBERT A. BAILEY knowingly did make materially false statments on an invoice submitted by the defendants to the Stockmen's Bank and Trust Company, a bank the deposits of which are insured by the F.D.I.C., for the purpose of influencing the action of

said bank to approve advances on a $300,000 construction loan, in that NORMAN B. SMITH and ROBERT A. BAILEY stated and represented in said invoice that approximately $15, 946.21 was owed for various expenses incurred on the Knollwood condominium project, when in truth and in fact, as NORMAN B. SMITH and ROBERT A. BAILEY well knew, approximately $13,946.21 was intended for their personal use unrelated to said project, and the said NORMAN B. SMITH and ROBERT A. BAILEY did knowingly and intentionally aid and abet each other in the commission of said offense;

In violation of 18 U.S.C. §§2 and 1014.

COUNT SIX

On or about the 25th day of February, 1982, in the District of Wyoming, NORMAN B. SMITH and ROBERT A.

BAILEY knowingly did make materially false statements on an invoice submitted by the defendants to Stockmen's Bank and Trust Company a bank the deposits of which are insured by the F.D.I.C., for the purpose of influencing the action of said bank to approve advances on a $300,000 construction loan, in that NORMAN B. SMITH and ROBERT A. BAILEY stated and represented in said invoice that approximately $10,000 was owed for various expenses incurred on the Knollwood condominium project, when in truth and in fact as NORMAN B. SMITH and ROBERT A. BAILEY well knew, approximately $9,300 was intended for their personal use unrelated to said project, and the said NORMAN B. SMITH and ROBERT A. BAILEY did knowingly and intentionally aid and abet each other in the commission of said offense;

In violation of 18 U.S.C. §§2 and

COUNT SEVEN

On or about the 2nd day of March, 1982, in the District of Wyoming, NORMAN B. SMITH and ROBERT A. BAILEY knowingly did make materially false statements on invoices submitted by the defendants to the Stockmen's Bank and Trust Company, a bank the deposits of which are insured by the F.D.I.C., for the purpose of influencing the action of said bank to approve advances on a $300,000 construction loan, in that NORMAN B. SMITH and ROBERT A. BAILEY stated and represented in said invoices that approximately $14,640.31 was owed for various expenses incurred on the Knollwood condominium project, when in truth and in fact, as NORMAN B. SMITH and ROBERT A. BAILEY well knew, approximately $14,473.81 was intended for their

personal use unrelated to said project, and the said NORMAN B. SMITH and ROBERT A. BAILEY did knowingly and intentionally aid and abet each other in the commission of said offense:

In violation of 18 U.S.C. §§2 and 1014.

COUNT EIGHT

On or about the 7th day of May, 1982, in the District of Wyoming, NORMAN B. SMITH and ROBERT A. BAILEY knowingly did make materially false statements on invoices submitted by the defendants to the Stockmen's Bank and Trust Company, a bank the deposits of which are insured by the F.D.I.C., for the purpose of influencing the action of said bank to approve advances on a $300,000 construction loan in that NORMAN B. SMITH and ROBERT A. BAILEY stated and represented in said invoices that

approximately $12,355.99 was owed for various expenses incurred on the Knollwood condominium project, when in truth and in fact, as NORMAN B. SMITH and ROBERT A. BAILEY well knew, approximately $10,657.53 was intended for their personal use unrelated to said project, and the said NORMAN B. SMITH and ROBERT A. BAILEY did knowingly and intentionally aid and abet each other in the commission of said offense.

In violation of 18 U.S.C. §§2 and 1014.

COUNT NINE

On or about the 10th day of August, 1982, in the District of Wyoming, NORMAN B. SMITH and ROBERT A. BAILEY did make materially false statements on invoices submitted by the defendants to the Stockmen's Bank and Trust Company, a bank the deposits of which are insured by the

F.D.I.C., for the purpose of influencing the action of said bank to approve advances on a $300,000 construction loan in that NORMAN B. SMITH and ROBERT A. BAILEY stated and represented in said invoices that approximately $12,777 was owed for various expenses incurred on the Knollwood condominium project, when in truth and in fact, as NORMAN B. SMITH and ROBERT A. BAILEY well knew, approximately $12,033 was intended for their personal use unrelated to said project, and the said NORMAN B. SMITH and ROBERT A. BAILEY did knowingly and intentionally aid and abet each other in the commission of said offense;

In violation of 18 U.S.C. §§2 and 1014.

A TRUE BILL,

_____
FOREPERSON

_____
Richard A. Stacy
United States Attorney

PHASE I CASH FLOW PROJECTIONS

	1st mo.	2nd mo.
Cash received		
Sale	-0-	-0-
Loan Proceeds	300,000	-0-
Total cash - received	300,000	-0-
Less:		
Cash disbursed		
A/E—	30,000	10,000
Excav.	4,000	4,000
Water/Sewer	14,400	-0-
Electrical	2,000	-0-
Foundation	14,400	14,400
Parking, etc.	10,000	10,000
Other	5,000	3,000
Const. cost/deposits	60,000	-0-
Const. cost/compl.	-0-	-0-
Expenses	56,593	56,593
Loan repayment	-0-	-0-
Land payment	-0-	-0-
Total cash disbursements Plus club building	196,393	97,993
Cash at Start of Period	300,000	103,607
Cash at End of Period	103,607	5,614

PHASE I CASH FLOW PROJECTIONS
(continued)

	3rd mo.	Phase I Total
Cash received		
Sale	822,000	822,000
Loan Proceeds	-0-	-0-
Total cash - received	822,000	1,122,000
Less:		
Cash disbursed		
A/E	-0-	40,000
Excav.	-0-	8,000
Water/Sewer	-0-	14,400
Electrical	-0-	2,000
Foundation	14,400	43,200
Parking, etc.	10,000	30,000
Other	2,000	10,000
Const. cost/deposits	-0-	60,000
Const. cost/compl.	339,600	339,600
Expenses	56,593	169,779
Loan repayment	300,000	300,000
Land payment	51,200	51,200
Total cash disbursements Plus club building	773,793	1,068,179
Cash at Start of Period	5,614	
Cash at End of Period	53,821	53,821

Filed October 24, 1986

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	No. CR85-100-K
	)	
vs.	)	
	)	
NORMAN B. SMITH and ROBERT A. BAILEY,	)	
	)	
	)	
Defendants.	)	

V E R D I C T

We, the jury duly empaneled in the above-entitled matter, do find the defendant NORMAN B. SMITH _____ GUILTY of conspiracy as set forth in Count One of the Indictment.

We, the jury duly empaneled in the above-entitled matter, do find the defendant ROBERT A. BAILEY _____ GUILTY of conspiracy as set forth in Count One of the Indictment.

We, the jury duly empaneled in the above-entitled matter, do find the defendant NORMAN B. SMITH _____ GUILTY of conspiracy as set forth in Count Two of the Indictment.

We, the jury duly empaneled in the above-entitled matter, do find the defendant ROBERT A. BAILEY _____ GUILTY of conspiracy as set forth in Count Two of the Indictment.

We, the jury duly empaneled in the above-entitled matter, do find the defendant NORMAN B. SMITH NOT GUILTY of conspiracy as set forth in Count Three of the Indictment.

We, the jury duly empaneled in the above-entitled matter, do find the defendant ROBERT A. BAILEY NOT GUILTY of conspiracy as set forth in Count Three of the Indictment.

We, the jury duly empaneled in the above-entitled matter, do find the

defendant NORMAN B. SMITH NOT GUILTY of conspiracy as set forth in Count Four of the Indictment.

We, the jury duly empaneled in the above-entitled matter, do find the defendant ROBERT A. BAILEY NOT GUILTY of conspiracy as set forth in Count Four of the Indictment.

We, the jury duly empaneled in the above-entitled matter, do find the defendant NORMAN B. SMITH _____ GUILTY of conspiracy as set forth in Count Five of the Indictment.

We, the jury duly empaneled in the above-entitled matter, do find the defendant ROBERT A. BAILEY _____ GUILTY of conspiracy as set forth in Count Five of the Indictment.

We, the jury duly empaneled in the above-entitled matter, do find the defendant NORMAN B. SMITH _____ GUILTY of conspiracy as set forth in Count Six of

the Indictment.

We, the jury duly empaneled in the above-entitled matter, do find the defendant ROBERT A. BAILEY _____ GUILTY of conspiracy as set forth in Count Six of the Indictment.

We, the jury duly empaneled in the above-entitled matter, do find the defendant NORMAN B. SMITH _____ GUILTY of conspiracy as set forth in Count Seven of the Indictment.

We, the jury duly empaneled in the above-entitled matter, do find the defendant ROBERT A. BAILEY _____ GUILTY of conspiracy as set forth in Count Seven of the Indictment.

We, the jury duly empaneled in the above-entitled matter, do find the defendant NORMAN B. SMITH NOT GUILTY of conspiracy as set forth in Count Eight of the Indictment.

We, the jury duly empaneled in the

above-entitled matter, do find the defendant ROBERT A. BAILEY NOT GUILTY of conspiracy as set forth in Count Eight of the Indictment.

We, the jury duly empaneled in the above-entitled matter, do find the defendant NORMAN B. SMITH _____ GUILTY of conspiracy as set forth in Count Nine of the Indictment.

We, the jury duly empaneled in the above-entitled matter, do find the defendant ROBERT A. BAILEY _____ GUILTY of conspiracy as set forth in Count Nine of the Indictment.

_____

FOREMAN

PROOF OF SERVICE

I, Linda M. Tominac, declare:

I am employed in the City and County of San Francisco, State of California. I am over the age of eighteen years and not a party to nor interested in the within action; my business address is 50 California Street, Suite 2450, San Francisco, California 94111. On March ~~24~~ 27, 1989, I served on true copy of the within PETITION FOR CERTIORARI by placing it in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

I declare under penalty of perjury

that the foregoing is true and correct.

Executed on this 24th day of March, 1989 at San Francisco, California.

Linda M. Tominac